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No. 98-1979

In The Supreme Court of the United States

WALTER D. SMALL,
LARRY W. NEPTUNE,
WILLIAM R. HOOGSTRA, AND
ALICE D. LORENZEN,
Petitioners,

v.

UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

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WALTER D. SMALL, *et al.*, Petitioners

v.

UNITED STATES OF AMERICA, Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION

1. Respondent Misstates the Central Issue

Francis Bacon noted that "a false and improper Imposition of Words strangely possesses the Understanding, for Words absolutely force the Understanding, and put all Things into Confusion." Francis Bacon, *Novum Organum Scientarum*, Section II, Aphorism VI. In this case, an "improper Imposition of Words" has transformed vital issues about the meanings of majority "recommendation," majority "finding," and "certification" in a statutory board context, and the authority of the Department of Defense to interpret federal statute, into an irrelevant discourse about the Air Force's theoretical right to use panels. [1]

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[1] See Brief in Opposition [Opp.] i (sole issue is "Whether 10 U.S.C. 616 or 617 bars the Air Force from using a panel system...."); 5 ("Petitioners argue ... that the Air Force's use of panels violates 10 U.S.C. 616(c)... and 617(a)"); 6 ("Petitioners are similarly mistaken in contending ... that use of panels is inconsistent with ... 10 U.S.C. 612(a)(3).... Petitioners also argue ... that the use of panels conflicts with DoD Directive No. 1320.9....").

The issue is not whether panels are prohibited; indeed, Petitioners have no objection to the abstract proposition that military departments may incorporate panels into their promotion board processes. Properly stated and understood, the issue is whether the Air Force may **use** panels and implement other procedures [2] in a manner that plainly violates express federal laws. A fitting analogy is the congressional committee system. If secret votes took place within Senate committees comprised of a minority of the Senators and a majority of the Senators were required to assent in blank to the committees' undisclosed results, the process would be patently unconstitutional. The issue would not be the Senate's right to have committees, which is indisputable. The issue, instead, would be the Senate's use of committees in a manner that precludes majority consensus.

The Petitioners' position is that Sections 616(c) and 617(a) mandate exactly what they say. Members must make recommendations and findings. Recommendations and findings by "a majority of the members of the board" are required before any officer may be promoted. Finally, "each member" must sign a report certifying that the recommended officers are the best qualified "in the opinion of a majority of the members of the board." These statutory mandates are not satisfied merely by the members' signatures on a blank paper when no member knows which officers are being recommended and there are no recommendations or findings (by either the individual members, a majority of any panel, or a majority of the board) to be approved and/or certified.

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[2] E.g. Pet 6-7 (nondescript scores not tantamount to recommendations or findings by the individual members; cumulative scoring does not insure majority consensus even within panels; blind signature process and behind-the-scenes manipulations preclude knowing certification of recommended officers). Contrary to Respondent's assertion (Opp. 6 n 4), Petitioners **do** make contentions apart from their contention that the "use of panels violates Sections 616(c) and 617(a)" because these problems would exist even if panels were not used.

Some level of knowledge on the part of the members about the candidates' qualifications is implicit in the statutory scheme. The members must consider the candidates' records in order to make recommendations and findings about them. [3] The members then must know whom they are recommending in order to make a certification to the Secretary. The statutory scheme is flouted when a majority of the members have **no** knowledge whatsoever of a majority of the candidates' records and **none** of the members know who will ultimately be recommended. [4]

Petitioners' position is also that Department of Defense Directive [DoDD] 1320.9 (1981) mandates exactly what it says – "centralized review" [5] by a "single board" to "insure fairness in the promotion selection process and a balanced appraisal of the needs of the Military Service concerned." Pet. App. A144. Respondent admits that "each panel's 'best qualified' officers, who are picked by their hierarchical placement within the panel's order of merit, are recommended for promotion." Opp. 3. [6] In fact, neither a fair

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[3] But see Pet. 18, 19 n. 16 (citing Morgan v. United States, 298 U.S. 468, 481 (1936), for proposition that decision maker must decide but may do so on basis of summaries compiled by others).

[4] Respondent maintains that first-hand knowledge is not required and that signature of a "blank sheet of paper" is not barred as long as the Secretary eventually receives the later-attached list. Opp. 5-6, 8-9. But see 10 U.S.C. § 617(a) (requiring the submission of a report **certifying** that the recommended officers on an accompanying list are, "in the opinion of a majority of the members of the board, ... best qualified for promotion."). Respondent's position would condone ignorant and unknowing certifications by military officers to their civilian superiors.

[5] The Senate Armed Services Committee would ultimately adopt the same phrase. S. Rep. No. 102-482, 102nd Cong., 2nd Sess. (1992) at 9 ("statutory centralized selection process" contemplates that officers "compete against their peers throughout the Air Force").

[6] This admission comports with the statement of a former Assistant Secretary of the Air Force about the uninvolvement of board members in the actual identification of the recommended officers (Pet. App. A 135), and supports Petitioners' position that recommendations and findings by "a majority of the members of the board" are never achieved.

process nor a balanced appraisal of the service's needs is possible if promotion decisions are made at the panel level and each panel considers only a small fraction of the eligible officers, rather than the full range of skills and qualifications offered by the entire pool of candidates.

2. Respondent's Attempt to Reconcile its Position with the Mandate of DoDD 1320.9 is Unavailing

Respondent argues that the Air Force promotion board process complies with DoDD 1320.9 because nothing therein restricts the use of panels. Opp. 6-7. [7] That stilted reading of DoDD 1320.9 will not withstand scrutiny.

DoDD 1320.9 explicitly provided for "centralized selection" by "a single board." Pet. App. A144. This express requirement is directly at odds with the Air Force's use of autonomous panels. Yet the court of appeals found the "policy of centralized review" to be "unpersuasive" and deferred instead to the contrary practices of the Air Force. The court of appeals clearly deferred to the wrong agency. To foster consistency in the application of national statutes, *certiorari* should be granted to provide guidance on identifying the proper administrative agency to which Chevron deference [8] is due.

3. Respondent's Attempt to Reconcile its Position with the Mandate of Sections 266(a) and 612(a)(3) is Unavailing

Petitioners argued that "centralized review" by a single board was implicit in the larger statutory scheme, including 10 U.S.C. §§ 266(a) [9] and 612(a)(3) that require a Reserve member on every board considering Reservists. Pet. 20-21. Respondent cites H.R. Rep. No. 141, 97th Cong., 1st

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[7] Petitioners do not complain that they "competed against any officers outside their competitive category." They cite DoDD 1320.9 for its superior and controlling interpretation of Sections 616(c) and 617(a) as requiring "centralized" review.

[8] Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[9] Section 266(a) was renumbered Section 12643(a) in 1994.

Sess. (1981), as quoted in Fluellen v. United States, No. 94-537C, 1999 WL 428037 (Fed. Cl. June 23, 1999), for the opposite proposition. Opp. 6. [10] In fact, H.R. Rep. No. 141 and Fluellen are compelling evidence that the Air Force's unique use of panels violates Sections 616(c) and 617(a).

The plaintiff in Fluellen was a Reserve officer who claimed to have been denied the protection afforded by Sections 266(a) and 612(a)(3) when the Air Force appointed one Reserve member to his promotion board, dissected that board into numerous autonomous panels, and then assigned the Reserve member to one panel where he considered only those candidates whose records happened to be randomly distributed to that panel. Citing Small's holding that knowing review and the personal participation of board members is not required by Sections 616 and 617, the court concluded that "the personal participation of a reserve officer on a panel considering a reserve officer for promotion is not required by 10 U.S.C. §§ 266(a) and 612(a)(3)." Fluellen v. United States, supra 1999 WL 428037 at *8.

The result of the court of appeals' interpretation of Sections 616 and 617 is that Reserve members may be walled off from considering the very Reserve candidates that Congress intended them to protect. [11] The impermissibility of such an interpretation is readily apparent from a recent decision by the Court of Appeals for the District of Columbia in which a similar interpretation of federal statute was found to be "absurd" and "rather astonishing." Cummock v. Gore, 1999 U.S. App. LEXIS 13605, *24 (D.C. Cir. 1999) (it is absurd to argue that government can

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[10] Petitioners do not claim that they were entitled to consideration by Reserve promotion board members. Rather, they cite Sections 266(a) and 612(a)(3) as evidence of legislative intent that promotion consideration be centralized rather than compartmentalized.

[11] Dilley v. Alexander, 603 F.2d 914, 923 (D.C. Cir. 1979) (Section 266(a) imposes a "nondiscretionary safeguard[] designed to ensure Reserve participation in decisions affecting Reserve members."); Doyle v. United States, 599 F.2d 984, 994 (Ct. Cl. 1979).

"appoint an individual to an advisory committee and then wall that individual off from the committee's operations").

H.R. Rep. No. 141 acknowledged the use of "panel[s] or other administrative subdivision[s]" and disclaimed any need for a Reserve member to serve on every panel. This history, far from supporting Respondent's position, proves that Congress did not intend for panels to operate autonomously **within** promotion boards. When a panel operates as an "administrative subdivision" **of** a board, there is no need for a Reserve member to serve on every panel. Instead, the Reserve member's participation in a centralized review process (where "a majority of the members of the board" make recommendations and findings about the candidates) insures that each Reserve candidate receives the full measure of protection envisioned by Sections 266(a) and 612(a)(3). Accord S. Rep. No. 102-482, supra, at 9 ("statutory centralized selection process") and DoDD 1320.9 ("centralized selection" by "a single board").

In sum, when Section 616(c) is construed according to its plain meaning and DoDD 1320.9 is given its full effect, Congress' statutory protections for Reservists are upheld. By contrast, when Small's unnatural construction of Section 616(c) is adopted and when DoDD 1320.9 is ignored, Congress' statutory protections for Reservists are rendered meaningless and ineffective.

Sections 616(c) and 617(a) are part of a comprehensive and interconnected statutory scheme. As shown by Fluellen, the court of appeals' errors are not limited to those two provisions. Indeed, it is easy to foresee Small's sanctioning of ignorant and unconscientious board consideration affecting special selection boards (10 U.S.C. § 628), Reserve promotion boards (10 U.S.C. Chapters 1403 and 1407), continuation boards (10 U.S.C. § 637), early retirement boards (10 U.S.C. § 638), and a host of others – in **all** the military services and perhaps civilian contexts as well. *Certiorari* should be granted to prevent the

proliferation of an error that will affect tens of thousands of citizens each year.

4. Respondent's Position *Vis-à-vis* Section 618(f) is a "Catch 22"

The court of appeals held that the members both reach the required majority consensus and make the required certification by the single act of signing the board report. Pet. App. A10. Petitioners have argued that this is an unworkable interpretation of Sections 616(c) and 617(a) because, *inter alia*, it destroys the confidentiality of board proceedings guaranteed by Section 618(f). Pet. 23-24. Respondent denies that the members' signatures impermissibly disclose their "personal views and deliberations" because each signature "merely reflects a final unanimous vote by the board that it considers the list of recommended candidates to be fully and best qualified for promotion." Opp. 7-8. Respondent goes on to report Air Force assurances that members are permitted to note their disapproval of the officers who will ultimately be recommended. Id. at 8 n 6. [12]

Respondent cannot have it both ways. Reaching majority consensus about candidates **is** the board's deliberative process. The signature process is not merely a "final" vote – it is the **only** vote and, according to the court of appeals, the actual mechanism by which majority consensus is derived. As such, each individual member's expression of approval or disapproval of the officers being recommended for promotion is the essence of that "member's personal views and deliberations." If the signature process is the defining deliberative act that yields the majority consensus required by statute, as the court of appeals held, then the Air Force interpretation of Sections 616(c) and 617(a) is impermissible because it causes a violation of Section 618(f). If the signature process is a mere non-deliberative formality, as Respondent now argues, then

[12] These "assurances" are, of course, unsubstantiated since no evidence of them was before the Court of Federal Claims or the Federal Circuit.

the majority recommendation and finding requirements of Section 616(c) are unfulfilled and the Air Force interpretation is manifestly impermissible.

5. Respondent's Reliance upon 10 U.S.C. § 615(b) is Unavailing

10 U.S.C. § 615(b) permits a Secretary to provide "guidelines" to a selection board. Respondent argues that the court of appeals was justified in concluding that that provision afforded the Air Force discretion to employ panels. Opp. 6. This argument is unavailing for three reasons.

First, the court of appeals did not rely upon Section 615(b) and did not reach the conclusion now attributed to it by Respondent. Second, the Secretary's guidelines to the promotion boards in this case [13] did not address any of the procedures at issue. Third, any such guidelines would have been patently inconsistent with DoDD 1320.9.

6. Respondent and the Court of Appeals Have Rewritten the Rules that Congress and DoD Affirmatively and Specifically Enacted

The court of appeals opined that Sections 616(c) and 617(a) "do not contain any specific methodology that the selection board must use in carrying out its deliberative process" and deferred to the Air Force's interpretation of those statutes. Pet. App. A9-10. Respondent relies repeatedly upon the lack of a "specific methodology" to essentially maintain that any promotion board process would pass statutory muster. Opp. 4, 5, 7, 9. Unfortunately, Respondent's summary recitation of the court of appeals' application of Chevron does nothing to address the basic propriety of that action and also avoids many of the other reasons why *certiorari* should be granted.

Respondent's position ignores the plain meaning of the words "majority," "recommendation," "finding," and "certify." It also ignores the fact that statutes are the work of human hands and must be read in the context of human

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[13] Small v. United States, Fed. Cir. No. 97-5074, *Joint Appendix* 144-50.

experience. Parsing a comprehensive statutory scheme and then examining each piece in a vacuum leads to incongruous and often unexpected results. In this case, for example, no one would reasonably expect Congress to expressly require that the members know something about the officers being recommended because some knowledge is implicit in the making of findings and recommendations. Nor would one reasonably expect Congress to include a provision expressly requiring that the members have knowledge of the facts they are certifying because knowledge is essential to the act of certification. [14]

This is not a case where "Congress' silence or ambiguity has 'left a gap for the agency to fill.'" Stinson v. United States, 508 U.S. 36, 44 (1993), quoting Chevron, 467 U.S. at 842-843. Congress might have been silent about the military's abstract discretion to have panels. Congress was **not** silent, however, about the need for centralization in the promotion process. Pet. 16-19. Nor was Congress silent about the fundamental prerequisites of valid promotion board operation – recommendations and findings by "a majority of the members of the board" and then a unanimous certification of that majority consensus. The meaning of Sections 616(c) and 617(a) is plain on the face of the statutes and this meaning is confirmed by the relationship between the statutes (Pet. 18), the unworkability of the certification process approved by the court of appeals (Pet. 22-24), the statutory scheme as a whole (Pet. 20-21), the legislative history (Pet. 21-22), the emasculation of Section 616(c) that results from compressing everything into Section 617(a)'s certification process (Pet. 19-20), and DoDD 1320.9 (Pet. 24-26). "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978). Because that basic difference has been forgotten in this important case

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[14] See Fed. R. Civ. P. 11 (certification of counsel).

involving the integrity of the officer promotion system, *certiorari* should be granted to rectify the error.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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